**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"B" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER AND**

**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA no.6423/Mum./2018**
(Assessment Year : 2009–10)

Income Tax Officer
Ward–17(2)(4), Mumbai ……. Appellant

v/s

Neumec Builders & Developers
207, 2nd Floor, Regent Chambers
208, Block no.III, Backbay Reclamation ..... Respondent
Nariman Point, Mumbai 400 021
PAN – AAFFN1763N

Assessee by : Shri S.D. Pathak
Revenue by : Dr. Mahesh Akhade

| Date of Hearing – 17/05/2023 | Date of Order – 30/05/2023 |
|---|---|

**O R D E R**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the Revenue challenging the impugned order dated 31/08/2018, passed under section 250 of the income tax Act, 1951 ("*the Act*") by the learned Commissioner of Income Tax (Appeals)-28, Mumbai ["*learned CIT(A)*"], which in turn arose from the assessment order dated 31/08/2017, passed under section 147 read with section 143(3) of the Act, for the assessment year 2009-10.

2. In this appeal, the Revenue has raised the following grounds:-

*"I. On the facts & circumstances of the case, the Ld. CIT(A) erred in holding that the AO has made addition u/s 50C of the Income Tax Act, 1961, whereas the addition made by the AO is under section 28 under the head Profit and gain of business or profession.*

*II On the facts & circumstances of the case, the Ld. CIT(A) erred in holding that the transfer of developmental rights are not covered u/s 50C whereas AO has treated the transfer of rights as taxable u/s 28 of the Act and not u/s 50C of the Act.*

*III On the facts & circumstances of the case, the Ld. CIT(A) erred in not considering the transfer of development right to the JV as a business transaction though the assessee by its own submission before the AO considered itself in the business of development rights.*

*IV On the facts & circumstances of the case, the Ld. CIT(A) erred in holding order dated 31.08.2017 as order passed u/s 147 of the Act whereas the order passed by the AO is in the nature of giving effect to the previous order that was passed u/s 143(3) r.w.s. 147 of the Act dated 19.12.2016.*

*V The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

3. We have considered the submissions of both sides and perused the material available on record. We, at the outset, find that the learned CIT(A) has very succinctly described the assessment proceedings in the opening paragraph of its findings on page 21 of the impugned order, which reads as under:-

*"10. Certain astonishing and fantastic facts came to light as I took up the mantle of a shoddily conducted investigation by AO…."*

4. The peculiar facts of the present case are that the assessee is a builder and developer. For the year under consideration, the assessee filed its return of income on 27/07/2009, declaring total income at Rs. Nil. The assessee along with one company, i.e. M/s Reodar Builders Private Ltd, formed a Joint Venture called Neumec & Reodar Builder JV, vide Joint Venture agreement dated 01/04/2008. As per the Joint Venture agreement, the expenses and

profit-sharing ratio of the assessee and M/s Reodar Builders Private Ltd is 30% and 70%, respectively. Vide Joint Venture agreement dated 01/04/2008, and Deed of Confirmation dated 24/08/2008, the assessee and the above company transferred respective development rights in respect of Plot No. 41 & 40A (South) of the Sewree Wadala Estate of the Municipal Corporation of Greater Mumbai and C.S. nos. 1007 and 1008 (part) of the Dadar Naaigam Division, Wadala, Mumbai admeasuring 5877.74 sq.m to the Joint Venture concern for the sale consideration of Rs.65 lakh. On receipt of information from Addl. DIT(I&CI), Unit-1, Mumbai, it came to light that Stamp Duty Authorities has considered the sale consideration of the said transfer at Rs.41,08,20,500, for stamp duty purpose, and accordingly, the assessee has not offered to tax an amount of Rs.12,32,46,150, being 30% share in the profits of Rs.41,08,20,500, under the head "*profits and gains of business*" on the transfer of development rights. In view of the above and on being satisfied, assessee's case for the assessment year 2009-10 was reopened by issuing notice under section 148 of the Act on 31/03/2016, (which was duly served upon the assessee on 30/05/2016), after recording the reasons for reopening the assessment.

5. The assessee requested to treat the original return, as a return filed in response to notice issued under section 148 of the Act. The reasons recorded for reopening the assessment were also provided to the assessee. During the course of reassessment proceedings, the assessee was asked to show cause as to why an amount of Rs.12,32,46,150 (i.e. 30% of 41,08,20,500) should not be treated as income under the head "*income from business/profession*" for

the year under consideration on transfer of development rights, which took place during the relevant financial year. In response thereto, the assessee submitted that no gain has arisen to the assessee on the transfer of the above properties during the financial year 2008-09.

6. During the reassessment proceedings, a reference under section 142A(1) and section 142A(7) read with section 131(1)(d) was made to the Departmental Valuation Officer ("*DVO*"), Valuation Cell, I, Mumbai vide letter dated 16/12/2016 to estimate/determine the actual sales consideration of properties transferred, as the market value i.e. Rs.41,08,20,500 (as determined by the Stamp Duty Authorities) is more than the value of Rs.65 lakh in the agreements.

7. On the basis that the assessment is getting barred by limitation, the AO passed the assessment order on 19/12/2016, under section 147 read with section 143(3) of the Act assessing the total income of the assessee at Rs. Nil, subject to the receipt of the report from the DVO for determination of the taxable profits of the assessee in respect of the above transaction. The AO further held that the fair market value so determined by the DVO will be adopted to compute the taxable profits of the assessee. The AO also held that if the report of the DVO is not received within six months then the value so adopted by the Stamp Duty Authorities at Rs.41,08,20,500, has to be considered while taxing the profits of the assessee in respect of the above transactions.

8. Being aggrieved by the aforesaid assessment order dated 19/12/2016, passed under section 147 read with 143(3) of the Act, the assessee e-filed an appeal on 19/01/2017 before the learned CIT(A) vide acknowledgement No. 596518091190117, which forms part of the paper book from pages 119-122. It is evident from Form No. 35 of the aforesaid appeal that the assessee had challenged the taxability of the receipts from the transfer of the development rights. The assessee also challenged the reference to DVO to determine the actual sale consideration of properties.

9. While the aforesaid appeal was pending before the learned CIT(A), the AO passed another assessment order under section 147 read with section 143(3) of the Act on 31/08/2017, assessing the total income of the assessee at Rs.12,32,46,150 (i.e. 30% of the value so adopted by the Stamp Duty Authorities at Rs. 41,08,20,500). It is pertinent to note that in this order also the AO noted that the fair market value so determined by the DVO will be adopted to compute the taxable profits of the assessee and since the report of the DVO is not received within six months, the value so adopted by the Stamp Duty Authorities at Rs.41,08,20,500, is considered, while taxing the profit of the assessee in respect of the above transaction. Against this order, the assessee filed an appeal before the learned CIT(A) on 14/09/2017, which resulted in the impugned order dated 31/08/2018 in the present appeal. The learned CIT(A) vide impugned order, inter-alia, held that the second assessment order is null and void. Being aggrieved, the Revenue is in appeal before us.

10. Therefore, from the above, it is sufficiently evident that firstly, the AO has passed two assessment orders under section 147 read with section 143(3) of the Act on the basis of the very same reassessment notice dated 31/03/2016 issued under section 148 of the Act. Even the reasons recorded by the AO while reopening the assessment and necessary approval/sanction from the Pr.CIT-17, Mumbai are also the same. Secondly, even in the second assessment order dated 31/08/2017, which has resulted in the present appeal, the income of the assessee is not based on the valuation report of the DVO and therefore is contrary to the provisions of section 142A(7) of the Act, which requires the AO to take into account such report while making the assessment or reassessment. Thirdly, the second assessment order dated 31/08/2017 is in respect of the transaction, which was already a subject matter of appeal before the learned CIT(A) and therefore the same is contrary to the second proviso to section 147 of the Act, as it stood at the relevant time.

11. It is pertinent to note that there is no provision in the Act, which authorises the AO to pass multiple assessment orders on its own without any direction from any higher administrative or appellate authority. It is further pertinent to note that Explanation-1(iv) to section 153 specifically provides that the period commencing from the date on which the AO makes a reference to the Valuation Officer under section 142A(1) of the Act and ending with the date on which the report of the Valuation Officer is received by the AO is excluded for the purpose of computation of limitation period under section 153 of the Act. Therefore, in view of the above, passing the assessment order on the pretext that the assessment is getting time-barred, without awaiting the

report of the DVO, is a completely incorrect understanding of the provisions of the Act.

12. Further the second proviso to section 147 of the Act, as it stood at the relevant time, reads as under:-

> *"Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment."*

13. As noted above, the assessee in its appeal against the first assessment order dated 19/02/2016, passed under section 147 read with section 143(3) of the Act, had challenged the taxability of the receipts from the transfer of the development rights before the learned CIT(A). Further, the assessee also challenged the reference to DVO to determine the actual sale consideration of properties. Therefore, the second assessment order dated 31/08/2017 passed under section 147 read with section 143(3) of the Act is clearly in contravention of the provisions of the aforesaid proviso to section 147 of the Act, since it reassesses the income which was the subject matter of the appeal before the learned CIT(A). We find that the Hon'ble jurisdictional High Court in ICICI Bank Ltd v/s DCIT, [2012] 204 Taxman 65 (Bombay) held that the power to re-open an assessment cannot be exercised to re-open issues that formed the subject matter of an appeal to Commissioner (Appeals).

14. Therefore, in view of the aforesaid findings, we affirm the conclusion reached in the impugned order that the second assessment order dated 31/08/2017, passed under section 147 read with section 143(3) of the Act is

null and void ab-initio being contrary to provisions of the Act. As the second assessment order is quashed for this short reason, we see no need to deal with other issues raised by the Revenue in the present appeal. Those aspects of the matter, as of now, are academic and infructuous.

15. In the result, the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 30/05/2023

| **Sd/-** | **Sd/-** |
|---|---|
| **S. RIFAUR RAHMAN** | **SANDEEP SINGH KARHAIL** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

**MUMBAI, DATED: 30/05/2023**

*Copy of the order forwarded to:*

*(1) The Assessee;*

*(2) The Revenue;*

*(3) The PCIT / CIT (Judicial);*

*(4) The DR, ITAT, Mumbai; and*

*(5) Guard file.*

True Copy
By Order

*Pradeep J. Chowdhury*
*Sr. Private Secretary*

Assistant Registrar
ITAT, Mumbai